No. 02-628

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IN THE

Supreme Court of the United States

LINDA FREW, on behalf of her daughter, CARLA FREW, *et al.*,

Petitioners,

v.

ALBERT HAWKINS, Commissioner of the Texas Health and Human Services Commission, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, AND INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Eleventh Amendment bars a federal court from ordering state officials to comply with provisions of a consent decree absent a showing that the provisions are necessary to vindicate a federal right.

2. Whether state officials waived Texas's Eleventh Amendment immunity by entering into the consent decree in this case.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state and local governments and officials throughout the United States.[1] *Amici* have a compelling interest in legal issues that affect state governments.

The Eleventh Amendment serves the essential purpose of protecting "the States' ability to govern in accordance with the will of their citizens." *Alden v. Maine*, 527 U.S. 706, 750-51 (1999). While the Court has held that the Eleventh Amendment does not bar a suit against state officials for prospective relief when necessary to vindicate a federal right, *see Ex parte Young*, 209 U.S. 123 (1908), the Court has made clear that Eleventh Amendment immunity can be overridden only to "vindicate the supreme authority of federal law." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984).

This case presents two important questions regarding a federal court's authority to override a State's Eleventh Amendment immunity and order state officials to comply with a consent decree. The first is whether a federal court can enforce a decree provision against a State when there is no showing that enforcement is necessary "to vindicate a federal right." Pet. App. 24a. The second is whether a State, by entering into a decree, permanently waives its immunity to any subsequent enforcement proceeding including proceedings brought to compel enforcement of provisions which do not remedy violations of federal law.

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[1] The parties have consented to the filing of this *amicus* brief and their letters of consent filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity other than *amici* or their members made a monetary contribution toward its preparation or submission.

Because of the importance of these questions to *amici* and their members, this brief is submitted to assist the Court in its resolution of this case.

STATEMENT

1. In 1993, petitioners brought this suit alleging that Texas officials were failing to provide EPSDT benefits to their children. *See* Pet. App. 4a-7a; *see also* 42 U.S.C. § 1396a(a)(43). The district court certified the case as a class action on behalf of a plaintiff class with more than 1.5 million members. *See* Pet. App. 7a. Following the denial of the State's motion to dismiss, the parties entered into settlement talks. *Id.*; *see also* Opp. 1-2. After lengthy negotiations, the parties proposed a consent decree, which the district court entered. *See* Opp. 2. The seventy-eight page decree "orders the state defendants to implement many highly detailed and specific procedures relating to the EPSDT program." Pet. App. 8a & n.9.

As the court of appeals recognized, Texas officials made substantial efforts to comply with the decree and improve the administration of the State's EPSDT program. *See id.* at 3a-4a. For example, Texas increased the number of employees and contract personnel working in the program "from about ten in 1993 to almost 500 in 2000." *Id.* at 3a. "Texas spends more than any other state on informing and outreach programs," and increased the number of contacts with class members from "about 2 million such contacts in 1995" to "about 4.8 million outreach contacts" in 1999, "including about 1.8 million voice-to-voice or face-to-face contacts." *Id.* at 4a.

The State's medical transportation program more than tripled the number of rides it provided "from about 750,000 trips" in 1993 "to 2.5 million trips" in 1999. *Id.* Although not required by federal law, the State also operates numerous toll-free lines to assist class members and "has made striking improvement in the operation of this service." *Id.*

The court of appeals found that as a result of its efforts, the State improved its "participation ratio," a federally mandated criterion for reporting performance to the Secretary, *see* 42 U.S.C. § 1396a(a)(43)(D), "from 18 percent in 1991 to 66 percent in 1998." Pet. App. 3a. While there are "some children [who] are unable or, for whatever reason, fail to take full advantage of" Texas's EPSDT program, *id.* at 4a, petitioners "presented no evidence of having requested and having been denied services." *Id.* at 101a (dist. ct. op.). As the court of appeals recognized, the State has "a substantial program to meet the medical needs of the class members." *Id.* at 3a.

2. In November 1998 petitioners commenced further litigation to enforce the decree. Petitioners asserted among other things that Texas officials were in violation of the decree because they had failed to "implement properly the outreach program and deliver required outreach reports" to petitioners, that they had failed to "assure that all class members receive medical and dental checkups," that they failed to "operate toll-free numbers so as to ensure that all calls are answered promptly by a knowledgeable and helpful staff member," and that they had failed to "provide EPSDT training for health care providers." *Id.* at 10a n.10.

After a hearing, the district court issued a lengthy opinion, which found that the officials had violated "numerous provisions" of the decree. *See id.* at 10a. The court rejected the State's contention that its Eleventh Amendment immunity barred the court from enforcing the decree except insofar as its provisions were necessary to remedy a violation of petitioners' federal rights. The court further ordered the State's officials to submit "proposed corrective action plans to remedy each violation of the decree detailed in Part One" of its opinion. *See id.* at 277a; *see also id.* at 54a-232a (Part One).

SUMMARY OF ARGUMENT

1. The Eleventh Amendment expressly limits a federal court's authority to impose equitable relief in a suit brought by a private party against a State. While the *Ex parte Young* exception authorizes a suit against a State for prospective relief, it does so only when necessary to vindicate the supremacy of federal law. The Court has thus recognized that the Eleventh Amendment bars a suit against state officials to enforce state law, *see Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984), and a suit against a state officer to enforce a contract. *See Hagood v. Southern*, 117 U.S. 52 (1886).

Petitioners' motion to enforce the decree does not satisfy the *Young* doctrine's fundamental prerequisite that the relief sought is necessary to remedy a continuing violation of federal law. Indeed, the district court expressly declined to conduct this analysis and held that the standard for *entry* of a decree, *see Firefighters v. City of Cleveland*, 478 U.S. 501, 525 (1986), was applicable to petitioners' motion to enforce. The court so held notwithstanding that *Firefighters* did not involve the standard for *enforcing* a decree and did not involve state defendants. The court accordingly ruled that the decree's provisions could be enforced against the State without any showing that the provisions were necessary to remedy a continuing violation of federal law.

The district court's ruling violated the core tenets of Eleventh Amendment jurisprudence. Most significantly, the Eleventh Amendment serves the essential purpose of protecting "the States' ability to govern in accordance with the will of their citizens." *Alden v. Maine*, 527 U.S. 706, 750-51 (1999). "[T]he allocation of scarce resources among competing needs and interests lies at the heart of the political process." *Id.* at 751. A federal court order directing state officials to comply with consent decree provisions which do not remedy a continuing violation of federal law is clearly

incompatible with the structural principle of protecting the political accountability of state governments. This is true regardless of whether the court "merely order[s]" state officials to submit corrective action plans, Pet. Br. 40, or subjects them to the draconian sanction of contempt.

2. Petitioners err in asserting that Texas has waived its Eleventh Amendment immunity. The provisions of the consent decree do not manifest the State's clear and unequivocal intent to waive its immunity to petitioners' enforcement motion. Nor does Texas' litigation conduct amount to a "voluntary invocation" of federal court jurisdiction, which results in a waiver.

The provisions of the decree relied upon by petitioners state that "[t]he term 'will' creates a mandatory, enforceable obligation," ¶ 302, and that "the parties may request relief from [the district court]" if the "Defendants' future activities [do not] comport with the terms and intent of [the] Decree." ¶ 303. These provisions do not establish a waiver of Eleventh Amendment immunity.

Paragraph 302 merely establishes the State's agreement that some of the decree provisions go beyond the aspirational. Moreover, to the extent the decree creates mandatory, enforceable obligations, the language does not establish the State's consent to be sued in federal court. State law can also create mandatory, enforceable obligations on the part of state officials but that does not make a suit to enforce such obligations sustainable in federal court. *See Pennhurst*, 465 U.S. at 106.

Similarly, that the parties "may request relief from" a federal court does not establish that the State has waived its immunity. This language does not express that the State waived its immunity or any other affirmative defense. Every plaintiff in federal court requests relief, but whether a litigant is entitled to relief is dependent upon the other party's

defenses and the limitations on a federal court's jurisdiction and equitable powers.

Nor should the Court deem the officials' conduct in agreeing to entry of the decree as a voluntarily invocation of federal court jurisdiction which permanently waives the State's Eleventh Amendment immunity. First, there is no basis for the Court to imply such a waiver when petitioners obtained no such concession from the State in the decree itself. Second, the Court has repeatedly held that Eleventh Amendment immunity can be raised at any point in the proceedings. Here there has been no final judgment and there has been no judicial determination that the State has violated federal rights. Allowing Texas to invoke its Eleventh Amendment immunity thus does not threaten the integrity of federal court decrees by undermining a judicial determination that the State has violated federal rights.

ARGUMENT

I. THE ELEVENTH AMENDMENT BARS A FEDERAL COURT FROM ORDERING STATE OFFICIALS TO COMPLY WITH PROVISIONS OF A CONSENT DECREE UNLESS NECESSARY TO VINDICATE A FEDERAL RIGHT

The court of appeals properly held that the Eleventh Amendment barred the district court from enforcing the provisions of the consent decree absent a showing that a provision is necessary "to vindicate a federal right." Pet. App. 24a. Petitioners' view that a federal district court can enforce a decree against state officials solely based on the test for determining whether the court has authority to enter a consent decree, *see Firefighters v. City of Cleveland*, 478 U.S. 501, 525 (1986); Pet. Br. 34, is manifestly erroneous.

That a federal court might have authority to enter a consent decree as a general matter does not resolve the further

question of whether the provisions of the decree can be enforced against a State under the *Ex parte Young* doctrine. *See, e.g., Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 269-70 (1997). As explained below, "[a] state's freedom from litigation was established as a constitutional right through the Eleventh Amendment." *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 51 (1944). This immunity from suit applies even to suits for injunctive relief, except when necessary to vindicate the supremacy of federal law. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105-06 (1984). Where, as here, a plaintiff cannot show that the enforcement of a consent decree's provisions is necessary to prevent a continuing violation of federal law, a federal court must recognize a State's sovereign immunity and dismiss the motion.

A. The Eleventh Amendment Bars A Suit Against A State For Injunctive Relief Except When Necessary To Prevent A Continuing Violation Of Federal Law

The Court has repeatedly held that "[t]he Eleventh Amendment confirms that 'the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III.'" *Green v. Mansour*, 474 U.S. 64, 68 (1985) (quoting *Pennhurst*, 465 U.S. at 98). The Court's cases establish that a State's immunity from suit in federal court applies to both actions for damages and those for injunctive relief. *See, e.g., Pennhurst*, 465 U.S. at 106; *Alabama v. Pugh*, 438 U.S. 781, 782 (1978) (per curiam). As the Court has explained, "[e]xpressly applying to suits in equity as well as at law, the amendment necessarily embraces demands for the enforcement of equitable rights and the prosecution of equitable remedies when these are asserted and prosecuted by an individual against a State." *Missouri v. Fiske*, 290 U.S. 18, 27 (1933). The text of the Eleventh Amendment makes this clear, stating that "[t]he Judicial power of the United States

shall not be construed to extend to any suit in law *or equity*, commenced or prosecuted against one of the United States. . . ." U.S. Const. Amend XI (emphasis added).

To give life to the Supremacy Clause, *see id.* Art. VI, cl.2, the Court has held that the States' constitutional immunity must yield when necessary to vindicate federal rights. *See Pennhurst*, 465 U.S. at 105; *see also Ex parte Young*, 209 U.S. 123 (1908). Under the *Young* doctrine, state officials who violate federal law are "stripped of [their] official or representative character. . . .The state has no power to impart to [its officials] any immunity from responsibility to the supreme authority of the United States." *Id.* at 160. *Young* thus "held that the Eleventh Amendment does not prevent federal courts from granting prospective injunctive relief to prevent a continuing violation of federal law." *Green*, 474 U.S. at 68.

The *Young* doctrine "is not, however, without limitations." *Idaho v. Coeur d'Alene Tribe*, 521 U.S. at 288 (O'Connor, J., concurring in part and concurring in the judgment). For example, "where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 74 (1996).

"[A]n action brought against a state official under *Ex parte Young* . . . expose[s] that official to the full remedial powers of a federal court, including . . . contempt sanctions." *Id.* at 75. Where Congress has created other mechanisms to obtain state compliance with federal requirements (such as the withdrawal of funding by the Secretary of a federal agency, *see, e.g.*, 42 U.S.C. § 1396c), the federal courts should be especially wary of authorizing litigants to sue state officials under the *Young* doctrine. *See Pharmaceutical Res. & Mfgrs. of America v. Walsh*, 123 S.Ct. 1855, 1874 (2003) (Scalia, J., concurring) ("the remedy for the State's failure to comply with the obligations it has agreed to undertake under the Medicaid Act is set forth in the Act itself: termination of funding by the Secretary") (citations omitted); *see also id.* at 1876 n. 3 (Thomas, J., concurring) ("States are free to deviate from the Medicaid Act's requirements, subject only to sanctions by the Secretary.").

Most significantly, the *Young* doctrine does not permit a federal court to enjoin state officials to comply with state law. *See Pennhurst*, 465 U.S. at 104-106. As the Court declared in *Pennhurst*, "when a plaintiff alleges that a state official has violated *state* law," the "need to reconcile [the] competing interests [of the Eleventh Amendment and the Supremacy Clause] is wholly absent." *Id.* at 106. As the Court further explained:

> In such a case the entire basis for the doctrine of *Young* and *Edelman* disappears. A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment.

Id. Consistent with this principle, the Court has also long recognized that the Eleventh Amendment prohibits a federal court suit against a state officer to compel performance of a state contract. *See Hagood v. Southern*, 117 U.S. 52, 67-68 (1886) (Eleventh Amendment bars suit against state officer for specific performance of contract); *In re Ayers*, 123 U.S. 443, 504 (1887) (Eleventh Amendment bars suit against state officer for injunction forbidding a breach of contract).

The Court's cases have thus repeatedly reaffirmed that the *Young* doctrine overrides the States' Eleventh Amendment

immunity only when a State is engaged in a "continuing violation of federal law." *Green*, 474 U.S. at 73. As the Court noted in *Green*: "[T]he availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Id.* at 68. As the Court further observed in *Pennhurst*, "the *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States' . . . . Our decisions repeatedly have emphasized that the *Young* doctrine rests on the need to promote the vindication of federal rights[.]" 465 U.S. at 105 (quoting *Young*, 209 U.S. at 160). *See also Idaho v. Coeur d'Alene Tribe*, 521 U.S. at 296 (O'Connor, J., concurring in part and concurring in the judgment) (*Young* involves "a straightforward inquiry into whether a complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective").

B. Petitioners' Motion To Enforce The Decree Is Barred By The Eleventh Amendment

Petitioners' motion to enforce the consent decree does not satisfy the *Young* doctrine's fundamental prerequisite for the exercise of federal equitable powers over a State and its officials—that the relief is necessitated by "an ongoing violation of federal law." *Id.* Indeed, the district court expressly declined to conduct this analysis. Instead, the court held that "'[i]n enforcing the consent decree, the court is bound solely by its language,' and that 'an interpretation of the decree must be based strictly on the language of the decree, and not on the legal requirements of the Medicaid Act, except to the extent that those requirements are clearly imported by the language of the decree.'" Pet. App. 14a (quoting Pet. App. 71a). This holding—which petitioners embrace—clearly exceeds the

limits of the *Young* doctrine and thus violates the Eleventh Amendment.

1. The district court reasoned that the Eleventh Amendment did not bar petitioners' motion to enforce the decree because it had subject matter jurisdiction to enter the decree under the three part test of *Firefighters v. City of Cleveland*, 478 U.S. 501, 525 (1986).[2] *See* Pet. App. 245a-263a. The court expressly rejected the State's (and the Fifth Circuit's) distinction between jurisdiction to enter and jurisdiction to enforce a consent decree against state officials. *See id.* at 257a-260a. Finding the distinction to be "utterly indefensible," *id.* at 257a, the district court explained:

> . . . the policy implications of limiting this distinction are obvious: "Having entered into the consent decree rather than bringing the dispute . . . to trial, [the defendant] cannot now evade an integral portion of that decree on the ground that it was not directly tied to a federal claim." Such an outcome would detract from the integrity of the court by allowing state defendants to avoid bargained-for obligations while receiving the benefit of escaping litigation and potential liability. The parties' intent would also be ignored in such a scheme, and the finality of the parties' voluntary agreements significantly undermined. Obviously, such decree nullification would leave little incentive for future parties to enter into voluntary agreements, which avoid often protracted and time-consuming litigation.

Id. at 258-259a (quoting *Kozlowski v. Coughlin*, 871 F.2d 241, 245 (2d Cir. 1989) (other citation omitted)). Because the decree provisions at issue in petitioners' enforcement motion

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[2] To enter a consent decree, a federal district court must find that the decree: 1) "spring[s] from and serve[s] to resolve a dispute within the court's subject matter jurisdiction," 2) "com[es] within the general scope of the case made by the pleadings," and 3) "further[s] the objectives of the law upon which the complaint was based[.]" *Firefighters*, 478 U.S. at 525 (internal quotations and other citations omitted).

fell "squarely within the parameters outlined in *Firefighters*," the district court held that they "may be enforced against" the State. *Id.* at 261a.

This reasoning is flawed in several respects. First, this Court's decision in *Firefighters* does not establish a jurisdictional rule but rather a set of principles for determining the appropriateness of a federal court's exercise of its equitable discretion to *enter* a consent decree. Notwithstanding that the parties to a lawsuit have negotiated a settlement, a federal district court retains discretion to decline to enter a consent decree. As the Seventh Circuit has explained, "[a] district judge need not lend the aid of the federal court to whatever strikes two parties' fancy." *Kasper v. Board of Election Comm'rs*, 814 F.2d 332, 338 (7th Cir. 1987). *Cf. Milliken v. Bradley*, 433 U.S. 267, 279-81 (1977) ("equitable principles" guide a federal court's exercise of its remedial powers). The *Firefighters* standard, which applies to the entry of consent decrees, thus has no bearing on the separate and distinct issue of whether a State can invoke its constitutional immunity under the Eleventh Amendment as a defense to a motion to enforce the decree. Nor could *Firefighters* have resolved the question as neither a State nor its officials were parties in that case. *See* 478 U.S. at 504.

Indeed, adoption of the *Firefighters* standard as the appropriate test for whether a district court can ignore a State's Eleventh Amendment immunity and enforce a decree would be error for two reasons. First, a "consent decree may be entered as a judgment of [a] court without any independent determination by the court that it is warranted under the facts or law pertinent to the case." Michael W. McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change*, 1987 U. Chi. Legal F. 295, 298. But even if state officials likely would have been found to be in violation of federal law at the time the decree was entered—an assumption that underlies the court's authority to enter the

decree, *see, e.g.*, *Evans v. City of Chicago*, 10 F.3d 474, 480 (7th Cir. 1993)—petitioners' position further assumes that state officials will continue to violate federal law indefinitely. This assumption is altogether unwarranted given that the purpose of the decree is to correct conditions that presumably violate federal law and that the decree's provisions typically exceed what is necessary to remedy a violation. *See Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367, 389 (1992). Thus, unless state officials have utterly failed to comply with the decree's provisions, there is no basis for simply assuming several years later that they are continuing to violate federal law.

Second, petitioner's proposal to adopt the *Firefighters* standard as the applicable test for determining whether a decree can be enforced would, in petitioners' language, "trivialize the Eleventh Amendment['s]" role within the constitutional scheme. Pet. Br. 31. While protecting the States' dignitary interests is one of the Amendment's core purposes, the immunity serves a far more fundamental purpose—it limits a federal court's authority to intrude into the policy choices made by a State and its citizenry. *See Alden v. Maine*, 527 U.S. 706 (1999).

The constitutional scheme "'split[s] the atom of sovereignty,'" creating "'two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.'" *Id.* at 751 (quoting *Saenz v. Roe*, 526 U.S. 489, 504 n. 17 (1999)) (other quotations and citation omitted). When a federal court "asserts authority over a State's most fundamental political processes, it strikes at the heart of the political accountability so essential to our liberty and republican form of government." *Id.*

Sovereign immunity thus serves the essential purpose of protecting "the States' ability to govern in accordance with the will of their citizens." *Id.* at 750-51. As the Court has

long recognized, "[w]hen the States' immunity from private suits is disregarded, 'the course of their public policy and the administration of their public affairs' may become 'subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests.'" *Id.* at 750 (quoting *In re Ayers*, 123 U.S. at 505).

The *Young* doctrine overrides these fundamental structural principles only when necessary to "vindicate the supreme authority of federal law." *Pennhurst*, 465 U.S. at 106. This justification is, however, "wholly absent," *id.*, when a party seeking to enforce the provisions of a consent decree either cannot or declines to show that the provisions are necessary to remedy a continuing violation of federal law. Such "bargained-for obligations," Pet. App. 259a (op. dist. ct.), are not "Laws of the United States" and are thus not within the ambit of the Supremacy Clause. U.S. Const. Art. VI, cl.2. As the Court has explained: "it is the agreement of the parties, rather than the force of the law upon which the complaint was originally based, that creates the obligations embodied in a consent decree." *Firefighters*, 478 U.S. at 522.

Indeed, but for the district court's entry of the decree, petitioners' suit to enforce the decree's provisions would be indistinguishable from a suit for specific performance of a contract, *see Hagood*, 117 U.S. at 67-68; or a suit for an injunction to restrain a breach of contract. *See In re Ayers*, 123 U.S. at 504; *see also United States v. ITT Continental Baking Co.*, 420 U.S. 223, 238 (1975) ("a consent decree or order is to be construed for enforcement purposes basically as a contract"). But as explained above, for more than a century the Court has recognized that the Eleventh Amendment bars a federal court from exercising jurisdiction over these two types of suits against state officials. *See Hagood*, 117 U.S. at 67-68; *Ayers*, 123 U.S. at 504. *See also Lynch v. United States*, 292 U.S. 571, 580-81 (1934) (quoting *The Federalist* No. 81 (Alexander Hamilton)) ("'The contracts between a [State] and

an individual are only binding on the conscience of the sovereign and have no pretensions to compulsive force. They confer no right of action independent of the sovereign will.'").

In the absence of the need to remedy continuing violations of federal law, the federal courts do not have authority to police the bargain struck by petitioners with Texas officials. Indeed, this Court's sovereign immunity jurisprudence has long held that "[a]lthough the State may, at the inception of the contract, have consented as one of its conditions to subject itself to suit, it may subsequently withdraw that consent and resume its original immunity." *Ayers*, 123 U.S. at 505. This rule applies notwithstanding that the consent was "given after much deliberation and for a . . . consideration," *Lynch*, 292 U.S. at 581, and "whatever the character of the proceeding." *Id.* at 582. As the Court further explained in *Lynch*, "immunity from suit is an attribute of sovereignty which may not be bartered away." *Id.*

Thus, this Court's cases flatly reject the district court's rationale. Moreover, the district court's reasoning ignores the availability of forums other than the federal courts for obtaining the State's compliance with its "bargained-for obligations," Pet. App. 259a, to the extent those obligations exceed the requirements of federal law. Most significantly, the Constitution does not grant the federal courts a general authority to supervise the agencies of state governments.

That the "bargained-for-obligations" have been given the imprimatur of a federal court order does not change this fundamental fact. *See* McConnell, *supra*, at 302 (a consent decree "gains no authority by virtue of being filed with the court"). A federal court order directing state officials to comply with decree provisions which do not remedy a continuing violation of federal law is clearly incompatible with the structural principle of protecting political accountability as manifested in *Alden* and *Printz v. United States*, 521 U.S. 898, 920-21 (1997). This is true whether the

court "merely order[s]" state officials to submit corrective action plans, *see* Pet. Br. 40, or subjects them to the draconian sanction of contempt.

"[T]he allocation of scarce resources among competing needs and interests lies at the heart of the political process." *Alden*, 527 U.S. at 751. Because all claims on a State's resources "cannot be satisfied in full, it is inevitable that difficult decisions involving the most sensitive and political of judgments must be made." *Id.*

Under the framework created by the Constitution, States have the right to change their policies and funding priorities. Except when a State's policy and allocation decisions violate federal law, the Constitution does not assign the federal courts a role in supervising this process. As the *Alden* Court further observed: "If the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government and invoked by the private citizen." *Id.*

There is thus no merit to petitioners' contention that "[i]t would impugn the federal courts' integrity to allow State officials to reassert immunity from enforcement of agreed consent decrees." Pet. Br. 31-32; *see also* Pet. App. 258a-259a (dist. ct. op.). As the Eleventh Amendment and the Court's *Young* jurisprudence make clear, the federal courts' integrity cannot be impugned when the Constitution expressly denies those courts the authority to order state officials to comply with decree provisions absent a need to remedy a continuing violation of federal law.

3. These principles apply fully in the context of litigation regarding a State's Medicaid program. While federal law establishes minimum requirements that state Medicaid programs must meet, it also "'gives the States substantial discretion to choose the proper mix of amount, scope, and duration limits on coverage.'" *Alexander v. Choate*, 469 U.S. 287, 303 (1985) (quoted in *PhRMA*, 123 S.Ct. at 1868 (opinion of Stevens, J.)). *See also* Andy Schneider & Rachel Garfield, *Medicaid Benefits*, in *The Medicaid Resource Book* 51 (Kaiser Comm'n on Medicaid and the Uninsured 2002) (States "have broad discretion to determine which categories of benefits their Medicaid programs will cover"). For example, prescription drugs, dental services, physical therapy, hospice care, prosthetic devices, and eyeglasses are optional benefits. *See id.* at 53. Moreover, although EPSDT services for persons under 21 are mandatory, diagnostic, screening, preventive and rehabilitative services for other Medicaid patients are optional. *See id.*

The States do not have limitless resources to spend on Medicaid. The cost of complying with a federal court decree thus may well result in a State being forced to limit the scope of optional benefits. While this may be a tolerable result when a decree's provisions must be enforced to remedy a continuing violation of federal law, it is a particularly untoward one when there is no showing of such a violation.

4. The district court also expressed the policy concern that if the State could invoke its Eleventh Amendment immunity in an enforcement action there would be "little incentive for future parties to enter into voluntary agreements, which avoid often protracted and time-consuming litigation." Pet. App. 259a. Petitioners likewise argue that under the court of appeals' rule, "plaintiffs will not enter into consent decrees with State official-defendants because plaintiffs will have to prove their case on the merits" in order to obtain judicial enforcement. Pet. Br. 34. According to petitioners, "[p]laintiffs will not waste time and energy to negotiate decrees that cannot be enforced without a full trial." *Id.* While these policy arguments cannot override a State's constitutionally protected immunity, they are in any event unpersuasive.

First, the argument ignores that plaintiffs will frequently obtain more relief from the State as a result of the settlement—even if the State can later assert its immunity in an enforcement proceeding—than they would have obtained if the case had gone to trial and been appealed. *See Rufo*, 502 U.S. at 389; *cf. Missouri v. Jenkins*, 515 U.S. 70, 88 (1995) (following trial "'the nature of the . . . remedy is to be determined by the nature and scope of the constitutional violation'") (quoting *Milliken*, 433 U.S. at 280).

Second, it ignores that "[t]he private party will obtain the relief it seeks for some period of time, perhaps forever, without the expense of trial." McConnell, *supra*, at 307. Contrary to petitioners' contention, "[f]uture officials may not object to the substantive terms of the decree." *Id.* Furthermore, "[f]uture officials . . . may be restrained from seeking to rescind [a consent decree] because of regulatory inertia, political pressure, or the desire to maintain good will with parties that have frequent contacts with the agency." *Id.* Indeed, the obligations created by a decree may provide plaintiffs' advocates with a useful bargaining tool in the state appropriations process. Moreover, the relief will be obtained sooner rather than years later after the lengthy process of trial and appeal.

Third, petitioners' argument makes two erroneous assumptions. The first is that state officials will not make good faith efforts to implement their part of the bargain. The second is that these efforts will not bring about substantial reforms in the way a state agency performs its functions.

This case amply demonstrates the above points. As one example, Texas officials have provided multiple toll-free lines to assist class members in obtaining checkups and transportation services. *See* Pet. App. 26a (ct. app. op.); *see also* Plaintiffs' Prehearing Motion to Enforce Consent Decree, ¶¶ 87-97. The State provided these lines even though they are

not "required by federal law or regulation." Pet. App. 26a (citation omitted).[3]

Moreover, the State made substantial improvements in its administration of the EPSDT program. Indeed, "Texas spends more than any other state on informing and outreach programs." *Id.* at 3a-4a. Among other things, the State increased the number of state and contract personnel assigned to the program "from about ten in 1993 to almost 500 in 2000." *Id.* at 3a. Furthermore, "[i]n 1999 [Texas] made about 4.8 million outreach contacts to class members[,] [which was] up from about 2 million such contacts in 1995." *Id.* at 4a. Most significantly, the State improved its "participation ratio"—a Center for Medicare and Medicaid criterion for assessing state performance—"from 18 percent in 1991 to 66 percent in 1998." *Id.* at 3a. If this case had gone through the lengthy process of trial and appeal, it is unlikely that Texas's program would have so quickly achieved so many substantial improvements.

Petitioners also argue that under the court of appeals' rule, plaintiffs will not agree to consent decrees and that both "plaintiffs and State officials will lose" the option of settlement. Pet. Br. 42. Petitioners' rule is, however, even more likely to eliminate the option of settlement.

It is improbable that any complex decree can be drafted without ambiguity. Indeed, even when a decree is well drafted—at least to the eyes of third parties—the parties may have different understandings of what its provisions require.[4]

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[3] Petitioners nonetheless seek additional relief—which the district court ordered—because on some of the lines, callers have an average wait of one-and-a-half to four minutes and because "some of Defendant's toll free number staff are not well trained, knowledgeable, helpful and polite." Plaintiffs' Prehearing Motion to Enforce ¶¶ 90, 96.

[4] For example, petitioners assert that "[t]he decree requires the officials to *assure that all* children, including at risk subgroups, receive medical and dental screens." Pet. Br. 45 (citing decree ¶¶ 2, 3, 143, 192, 212)

Under petitioners' view, plaintiffs would be able to seek a federal court order enforcing their interpretation of a provision without regard to the reasonableness of that interpretation. Plaintiffs would be able to summon the State to defend itself even though judicial enforcement of their interpretation would interfere with other important state priorities and without regard to whether the State's compliance is necessary to remedy a continuing violation of federal law.[5] Moreover, petitioners could invoke this right for as long as the decree provisions remain in effect. If entry of a decree effectuates a State's waiver of immunity to any

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(emphasis added). Petitioners effectively read this provision as a guaranty by the State that every class member will receive the screens.

The decree does not, however, create any such obligation. Of the provisions cited by petitioners, only ¶¶ 192 and 212 even use the word "assure" and only ¶ 212, which pertains to children under the supervision of the Texas Department of Protective and Regulatory Services (TDPRS) arguably imposes such a requirement on Texas officials. *See* Lodging at 56-57 (requiring the Texas Department of Health and TDPRS to enter into a Memorandum of Understanding that will "assure that all EPSDT recipients under the supervision of TDPRS receive all medical and dental check ups when due").

The other cited provision, ¶ 192, pertains only to patients enrolled in managed care and thus applies only to a subset of the class. Furthermore, the provision is plausibly read as requiring the State to "assure" only that managed care organizations provide enrolled class members with EPSDT services "in a timely manner." Lodging at 52; *see also id.* ("TDH will assure . . . that managed care organizations provide . . . checkups to newly enrolled recipients no later than 90 days after enrollment . . . "). The provision does not create an obligation on the part of the State to assure that every class member receives services.

[5] The decree also "contemplates that the parties will reach agreement in the future about several issues." Lodging ¶ 303. Among other things, petitioners sought and obtained federal court relief based on the State's failure to obtain their approval as to whether three of the State's proposed measures of health outcomes were appropriate to measure the health of the class. *See* Plaintiffs' Prehearing Motion to Enforce, at ¶¶ 115-116. *See also* Pet. App. 225a.

enforcement motion, than state officials would do just as well to litigate.

Thus, under the Fifth Circuit's rule ample incentives remain for plaintiffs to settle rather than litigate. In any event, even if the district court's analysis of the "policy implications" had merit, such considerations cannot override Texas' constitutional immunity from suit, which is made explicit by the text of the Eleventh Amendment and is fully supported by more than a century of this Court's jurisprudence. *See, e.g., Pennhurst*, 465 U.S. at 123 ("considerations of policy cannot override the constitutional limitation on the authority of the federal judiciary to adjudicate suits against a state").

II. TEXAS HAS NOT WAIVED ITS ELEVENTH AMENDMENT IMMUNITY

Petitioners contend that Texas officials have waived the State's Eleventh Amendment immunity from their motion to enforce the decree. *See* Pet. Br. 18-30. According to petitioners, the language of the decree and the state officials' litigation conduct establish that the State has waived its Eleventh Amendment immunity to any enforcement proceeding.

The Court should reject petitioners' contentions for three reasons. First, the language of the decree does not manifest the State's clear intention to waive its immunity to any subsequent enforcement proceeding. Second, the State's litigation conduct did not effectuate a waiver of its Eleventh Amendment immunity to a subsequent enforcement proceeding. A State has always been able to withdraw its consent to suit, *see Ayres*, 123 U.S. at 505, and allowing it to do so here does not create a "seriously unfair" or anomalous result. *See Lapides v. Board of Regents*, 535 U.S. 613, 619 (2002). Third, petitioners' rule violates the Constitution's structural principle of preserving the political accountability of state governments. *See generally Alden*, 527 U.S. at 750-51; McConnell, *supra*, at 316; *see also New York v. United*

States, 505 U.S. at 169 ("Accountability is . . . diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation."). The judgment of the court of appeals should therefore be affirmed.

1. Petitioners argue that the language of two provisions of the decree (¶¶ 302 & 303) establish that Texas has waived its immunity. *See* Pet. Br. 26-27. It is, however, "'settled'" law that a State's "waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'" *College Savings Bank v. Florida Prepaid Postsec. Ed. Expense Bd.*, 527 U.S. 666, 682 (1999) (quoting *United States v. King*, 395 U.S. 1, 4 (1969)). The language of these provisions falls short of the unequivocal expression of intent that is required to show that the State has voluntarily relinquished its constitutional immunity to any subsequent proceeding to enforce the decree.

Petitioners note that ¶ 302 of the decree states that "[t]he term 'will' creates a mandatory, enforceable obligation." ¶ 302, quoted at Pet. Br. 27. Petitioners further note that ¶ 303 provides that "the parties may request relief from [the district court]" if the "Defendants' future activities [do not] comport with the terms and intent of this Decree." ¶ 303; *see* Pet. Br. 26-27. Petitioners assert that these provisions demonstrate that the State has waived its immunity to their enforcement motion.

The language of these provisions does not, however, manifest a clear and unequivocal intent by the State to waive its immunity from suit in federal court. State law also typically creates mandatory and enforceable obligations on the part of state officials but that does not make a suit to enforce such obligations sustainable in federal court. *See Pennhurst*, 465 U.S. at 106. That the decree created "mandatory, enforceable obligations" does not express anything more than the State's agreement that some of the decree provisions go beyond the

aspirational.[6] And even with respect to those provisions, the decree's language does not manifest in clear and unequivocal terms the State's open-ended, unqualified consent to proceedings in a federal court to enforce them. *See* Pet. App. 41a-42a (discussing State's failure to "unequivocally waive[] its Eleventh Amendment immunity" by its litigation conduct).

Nor does ¶ 303's language stating that the parties "may request relief from this Court" alter this conclusion. Paragraph 303 does not say that the State waived its Eleventh Amendment immunity or any other affirmative defense. A litigant can always request relief from a federal court; indeed every complaint is required to have a demand for relief. *See* Fed. R. Civ. P. 8(a). Whether a litigant is entitled to relief is an entirely different matter that depends upon the other party's defenses and the limitations on a federal court's jurisdiction and equitable powers. *See, e.g.*, *Milliken*, 433 U.S. at 282 ("[F]ederal-court decrees must directly address and relate to the constitutional violation itself. Because of this inherent limitation upon federal judicial authority, federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation . . . .") (citation omitted). Paragraph 303 contains no expression of Texas' intent to waive its Eleventh Amendment immunity in every subsequent enforcement proceeding. Nor could the parties, even if they agreed to do so, grant a federal court authority to exceed the inherent limitations on its equitable powers.

Furthermore, ¶ 301 states that "Plaintiffs do not concede the validity of Defendants' defenses." Eleventh Amendment immunity is the State's principal defense. If ¶¶ 302 and 303 did, in fact, manifest the parties' agreement that the State had

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[6] Many of the decree provisions can be reasonably read as setting goals as opposed to mandatory obligations.

waived its immunity to any enforcement proceeding, the language of ¶ 301 would be surplusage. In fact, the language suggests that the State was preserving its defenses—including its Eleventh Amendment immunity—for any subsequent enforcement proceeding. In any event, because the language of the decree contains no statement by the State expressly waiving its immunity from suit in federal court, petitioners cannot argue that the State has made a knowing and intelligent waiver. *See College Savings Bank*, 527 U.S. at 682 ("[C]ourts indulge every reasonable presumption against waiver of fundamental constitutional rights.") (internal quotations and citation omitted).

2. Petitioners further err in asserting that Texas's litigation conduct has effectuated a waiver of its immunity. *See* Pet. Br. 21. Contrary to petitioners' contention, that state officials acceded to a consent decree after they were sued does not involve the type of voluntary invocation of federal court jurisdiction that results in a waiver of the immunity with respect to any thing other than the entry of the decree. *See, e.g.*, *Lapides*, 535 U.S. at 619-20; *cf.* McConnell, *supra*, at 302 (consent decree "has no more force than any other agreement between a government official and a private party. It gains no authority by virtue of being filed with the court").

Unlike *Lapides*, this is not a case "'where a State *voluntarily* becomes a party to a cause and submits its rights for judicial determination.'" 535 U.S. at 619 (quoting *Gunter v. Atlantic Coast Line R. Co.*, 200 U.S. 273, 284 (1906)). Texas has neither filed a claim in federal court, *see Gardner v. New Jersey*, 329 U.S. 565, 574 (1947), nor made a "voluntary appearance" by intervening in a lawsuit to prosecute a claim. *See Clark v. Barnard*, 108 U.S. 436, 447 (1883).

Nor has Texas "voluntarily invoked" federal court jurisdiction by removing a case from state to federal court. *Lapides*, 535 U.S. at 620. To the contrary, Texas did not become a party in federal court by choice. Rather, it was

subjected to the "coercive process of [a federal] judicial tribunal[] at the instance of private parties," *In re Ayers*, 123 U.S. at 505, because petitioners' suit compelled Texas to appear and defend itself. When the alternative is between settling and defending on the merits and being subjected to lengthy litigation in potential violation of its Eleventh Amendment immunity, agreeing to the entry of a consent decree cannot be deemed a voluntary invocation of federal court jurisdiction.

3. Petitioners argue that "when a State waives immunity by litigation conduct, it cannot change its mind later." Pet. Br. 21 (citing *Lapides*, 535 U.S. at 619). Petitioners further contend that "once a State waives immunity, 'it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment.'" *Id.* at 21-22 (quoting *Gunter*, 200 U.S. at 284).

But even assuming that agreeing to the entry of a consent decree constitutes a waiver of immunity, the Court has long recognized that "[a]lthough the State may, at the inception of the contract, have consented as one of its conditions to subject itself to suit, it may subsequently withdraw that consent and resume its original immunity." *In re Ayers*, 123 U.S. at 505. This rule applies even though the consent was "given after much deliberation and for a . . . consideration," *Lynch*, 292 U.S. at 581, and "whatever the character of the proceeding." *Id.* at 582. Because a consent decree "gains no authority by virtue of being filed with the court," McConnell, *supra*, at 302, judicial entry of the agreement cannot override the fundamental rule that "immunity from suit is an attribute of sovereignty which may not be bartered away." *Lynch*, 292 U.S. at 582.

Moreover, neither *Lapides* nor *Gunter* involved a consent decree and are thus not pertinent authority. To the contrary, as *Lapides* demonstrates, waiver by litigation conduct is a narrow exception to the rule against implied waivers and

which is invoked only to prevent "generat[ing] seriously unfair results." *Lapides*, 519 U.S. at 619. Indeed, in *Lapides*, state law expressly waived the State's sovereign immunity in state court from the plaintiff's state law claim, *see id.* at 616-17, and this Court expressly noted that it was not "address-[ing] the scope of waiver by removal in a situation where the State's underlying sovereign immunity from suit has not been waived or abrogated in state court." *Id.* at 617-18.

The *Lapides* Court recognized the unfairness of allowing the State's lawyers to remove the case from state to federal court and obtain a dismissal by invoking the Eleventh Amendment when the State had made the sovereign choice to waive its immunity for such a claim. As *Lapides* explained, "an interpretation of the Eleventh Amendment that finds waiver in the litigation context rests upon the Amendment's presumed recognition of the judicial need to avoid inconsistency, anomaly, and unfairness, and not upon a State's actual preference or desire, which might . . . favor selective use of 'immunity' to achieve litigation advantages." 535 U.S. at 620.

This reasoning does not apply here. As *Lapides* itself notes, "the Eleventh Amendment waiver rules are different when a State's federal-court participation is involuntary." *Id.* at 622. Moreover, there are several additional reasons why Texas' litigation conduct should not be deemed a waiver of its immunity to this enforcement proceeding.

First, there is no reason for the Court to imply a waiver by litigation conduct when petitioners obtained no such concession in the terms of the decree itself. *See* discussion *supra* at 22-24. Putting aside the question of whether state officials can agree to a decree provision binding their successors in perpetuity from invoking Eleventh Amendment immunity, *cf.* McConnell, *supra*, at 303-04, there is no basis for the Court to give petitioners a right they did not obtain in the settlement negotiations.

Second, the Court has repeatedly held that "the Eleventh Amendment is jurisdictional in the sense that it is a limitation on the federal court's judicial power, and therefore can be raised *at any stage of the proceedings*." *Calderon v. Ashmus*, 523 U.S. 740, 745 n.2 (1998) (emphasis added). *See also Pennhurst*, 465 U.S. at 99 & n.8; *Edelman v. Jordan*, 415 U.S. 651, 678 (1974). Indeed, the Court has held that a State can raise the immunity for the first time in this Court. *See Pennhurst*, 465 U.S. at 99 n.8 (citation omitted).

Here, as petitioners expressly acknowledge, the proceedings are interlocutory. Pet. Br. 37. "There is no final judgment," *id.*, and there has been no judicial determination that the State has violated federal rights. This is obviously not a case like *Gunter*, where more than thirty years earlier the State failed to raise its Eleventh Amendment immunity at any point in the original suit for injunctive relief, including the proceedings in this Court, and thus "voluntarily . . . submit[ted] its rights for judicial determination" and entry of a final judgment. *See* 200 U.S. at 284; *see also Humphrey v. Pegues*, 83 U.S. (16 Wall.) 244, 247-49 (1872). Allowing Texas to invoke its Eleventh Amendment immunity in response to petitioners' motion to enforce thus does not threaten the integrity of federal court decrees by undermining a judicial determination that the State has violated a federal right.[7]

Third, petitioners' waiver theory is in essence an invocation of estoppel doctrine. But "even assuming that the Government is ever subject to estoppel, a 'private party surely cannot prevail without at least demonstrating that the traditional elements of an estoppel are present.'" *Lyng v. Payne*, 476 U.S. 926, 935 (1986) (quoting *Heckler v. Community Health Services*, 467 U.S. 51, 61 (1984)). One of the elements that petitioners must show is a "detrimental

[7] Indeed, under the *Firefighters* standard a federal court is not required to make any finding that a defendant has violated a federal right.

change in position," *i.e.*, that the government's conduct "has caused the private citizen to change his position for the worse." *Heckler*, 467 U.S. at 61.[8]

This petitioners cannot do. By agreeing to the consent decree, petitioners gave up the right to go to trial. But even if petitioners had proceeded to trial, they were only entitled to relief necessary to remedy a continuing violation of federal law. *See Jenkins*, 515 U.S. at 89 (quoting *Milliken*, 433 U.S. at 280 ("'the nature of the . . . remedy is to be determined by the nature and scope of the constitutional violation'")). Petitioners can, however, still bring suit under the *Young* doctrine if the State is continuing to violate their federal rights, and under the court of appeals' holding, petitioners can obtain enforcement of the decree to the extent violations of its provisions are violations of federal rights. *See* Pet. App. 27a-28a; *see also* McConnell, *supra*, at 305 ("In the typical public law case, nothing more is required than to permit the private party to reopen the litigation, because the party has given up nothing other than the lawsuit.").[9]

Furthermore, petitioners received the benefit of the State's substantial efforts to comply with the decree notwithstanding that many of those provisions cannot reasonably be viewed as

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[8] While petitioners and the district court focus on the putative benefits the State gained by entering into the decree, *see* Pet. App. 259a (dist. ct. op.); Pet. Br. 25, they cannot show any harm as a result of the State's agreement to the decree.

[9] Petitioners contend that the State "obtained an order that protects them from further suit by other class members concerning the same issues because 'all members of the class . . . are bound by the judgment.'" Pet. Br. 25 (quoting 5 *Newberg on Class Actions* § 16.20 at 226 (4th ed. 2002)). The argument ignores, however, that thousands of persons who are now eligible for EPSDT were either not yet born at the time of the settlement or were not then eligible for Medicaid. It is implausible to suggest that these persons can be bound by the decree when they were not members of the class at the time the decree was entered. The decree therefore does not protect the State "from further suit." Pet. Br. 25.

relief necessary to remedy a violation of federal law. Thus, in no sense did Texas, by agreeing to the decree, cause petitioners "to change [their] position for the worse." *Heckler*, 467 U.S. at 61. Allowing Texas to invoke its immunity thus does not generate a "seriously unfair result[]." *Lapides*, 535 U.S. at 619.

On the contrary, petitioners' rule is a prescription for private litigants and federal courts to micromanage the operations of state government. It undermines the fundamental premises of our constitutional structure—that both state and federal governments are sovereigns within their respective spheres and that through the electoral process, the citizenry expresses its policy preferences to politically accountable officials. *See Alden*, 527 U.S. at 750-51.

Petitioners' waiver rule nullifies "a central tenet" of politically accountable government—that "the people, and their elected officials, must be allowed to change their minds." McConnell, *supra*, at 318. While state officials must obey federal law, *Alden*, 527 U.S. at 754-55, the Eleventh Amendment exists to preserve "the States' ability to govern in accordance with the will of their citizens." *Id.* at 750-51. Thus, to protect this fundamental principle, the Court should make clear that state officials do not permanently waive the State's Eleventh Amendment immunity to an enforcement proceeding by entering into a consent decree.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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